

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREGORY CECIL EARLY,

Defendant.

CASE NO. 2:10-CR-0178-EFS

**ORDER DENYING THE FEDERAL
DEFENDER'S RENEWED MOTION FOR
APPOINTMENT OF COUNSEL**

The Court is again asked by the Federal Defenders of Eastern Washington and Idaho to appoint an attorney from the office as counsel for Defendant Gregory Cecil Early, who was sentenced in 2012, in order to investigate whether habeas corpus relief under 28 U.S.C. § 2255 in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), is a potential for Mr. Early.¹ ECF No. 118. This motion follows the Court's March 25, 2016 denial of an earlier motion for appointment of counsel. ECF Nos. 116 & 117. The Federal Defenders ask the Court to reconsider the denial

¹ This motion was filed as an ex parte motion. However, there is nothing contained in the motion that requires restricting public review of the motion. Accordingly, the Court directs the Clerk's Office to convert it to a public motion on the docket.

1 of appointment of counsel because 1) *Johnson* applies to individuals
2 sentenced under the U.S. Sentencing Guidelines, and 2) other districts
3 across the Ninth Circuit have appointed counsel for defendants whom were
4 previously appointed counsel to determine if such a defendant is
5 potentially eligible for relief under § 2255 in light of *Johnson*. For
6 the reasons that follow, the Court abides by its prior denial of counsel
7 and denies the motion.

8 First, the Court recognizes that other districts have elected a
9 "blanket" appointment process for defendants to determine if the filing
10 of a § 2255 motion in light of *Johnson* is appropriate. Thus far, this
11 district has not taken a "blanket" approach but rather will consider
12 independent motions for appointment of counsel. The Court did so in
13 this case, and again addresses another motion for appointment of counsel
14 for Mr. Early.

15 Second, the Court recognizes that many sections of the U.S.
16 Sentencing Guidelines call for an analysis of whether a defendant's
17 prior conviction qualifies as a "crime of violence" either for purposes
18 of an enhancement to the base offense level, such as section 2K2.1(a)(3)
19 (firearm offense), or for purposes of Career Offender status under
20 Guideline section 4B1.2, as in Mr. Early's case. Now following *Johnson*,
21 either at sentencing or upon resentencing after a remand, the Court
22 must abide by *Johnson* and subsequent Ninth Circuit case law, *see United*
23 *States v. Hernandez-Lara*, 2016 WL 1239199, --- F.3d ---- (9th Cir. March
24 29, 2016) (finding that the Immigration and Nationality Act's definition
25 of aggravated felony was void for vagueness). However, Mr. Early's case
26 is at a different procedural posture; he is potentially seeking

1 collateral relief under 28 U.S.C. § 2255. Although unfair results may
2 occur in light of *Johnson* and the procedural restrictions imposed by §
3 2255's one-year statute of limitations, such is the nature of direct
4 versus collateral proceedings.²

5 As the Court indicated in its earlier order denying appointment
6 of counsel, Mr. Early was not sentenced to an Armed Career Criminal Act
7 (ACCA) enhanced sentence. Instead, Mr. Early elected to enter into a
8 plea agreement with the government and plead to drug distribution as
9 charged in the Information Superseding Indictment. The Plea Agreement
10 stated,

11 At the time of sentencing, the United States agrees to move
12 the Court to dismiss the Indictment, CR-10-0178. The
13 Defendant understands that the benefit of this Plea Agreement
14 is that a conviction to Count 1 of CR-10-178-EFS would likely
15 result in a finding by the Court that he is an Armed Career
16 Criminal, pursuant to 18 U.S.C. § 924(e)(1), which would
17 result in a statutory mandatory minimum fifteen (15) year
18 sentence of incarceration.

19 ECF No. 78 ¶ 8(b). The Plea Agreement was pursuant to Federal Rule of
20 Criminal Procedure 11(c)(1)(C). The Court accepted the plea of guilty
21 but delayed acceptance of the Plea Agreement until sentencing. ECF No.
22 79. The Plea Agreement contained the following paragraph in regard to
23 appeal rights:

24 The Defendant understands that he has a limited right to
25 appeal or challenge the conviction and sentence imposed by

26 ² *Johnson* could be determined not to have retroactive application *in toto* or
as to other matters, such as "crime of violence" under the Guidelines. The
question of retroactivity should be addressed, at least as to defendants
whom received an enhanced sentence under the Armed Career Criminal Act
based on a prior "residual clause" conviction, by the Supreme Court in
Welch v. United States, No. 15-6418, 2015 WL 9666637 (2016).

1 the Court. If the Court sentences the Defendant to no more
2 than one-hundred and eighty (180) months incarceration,
3 followed by a five (5) year term of supervised release, \$100
4 special penalty assessment, and any applicable restitution,
5 the Defendant hereby expressly waives his right to appeal his
6 conviction and the sentence the Court imposes, including any
7 restitution order. The Defendant further expressly waives his
8 right to file any post-conviction motion attacking his
9 conviction and sentence, including a motion pursuant to 28
10 U.S.C. § 2255, except one based upon ineffective assistance
11 of counsel based on information not now known by the Defendant
12 and which, in the exercise of due diligence, could not be
13 known by the Defendant by the time the Court imposes the
14 sentence. Moreover, if the Defendant does file an appeal, the
15 Defendant acknowledges and agrees that the United States may
16 move to reinstate all counts in Indictment CR-10-178-EFS.

17 ECF No. 78 ¶ 16. After reviewing the presentence investigation report
18 and the sentencing memoranda submitted by both parties, and considering
19 oral argument and the 18 U.S.C. § 3553(a) sentencing factors, the Court
20 accepted the binding plea agreement and imposed 162 months of
21 imprisonment, which was below the applicable Sentencing Guideline range
22 of 262 to 327 months. ECF No. 105.

23 Although Mr. Early was sentenced to a significant amount of
24 imprisonment, the imposed sentence was consistent with the parties' Plea
25 Agreement. Plea negotiating is a matter of contract. "Plea agreements,
26 the Supreme Court has long instructed, may waive constitutional or
statutory rights then in existence as well as those that courts may
recognize in the future." *United States v. Bradley*, 400 F.3d 459, 463
(6th Cir. 2005). "A favorable change in the law does not entitle a
defendant to renege on a knowing and voluntary guilty plea." *United*
States v. Cortez-Arias, 425 F.3d 547, 548 (9th Cir. 2005), amending in
part *United States v. Cortez-Arias*, 403 F.3d 1111 (9th Cir. 2005); see
also *Brady v. United States*, 397 U.S. 742, 757 (1970) ("[A] voluntary

1 plea of guilty intelligently made in the light of the then applicable
2 law does not become vulnerable because later judicial decisions indicate
3 that the plea rested on a faulty premise."). The Court found Mr. Early's
4 plea to be knowing, intelligent, and voluntary, ECF No. 79, and the
5 Court accepted the binding plea agreement, ECF No. 105. Accordingly,
6 Mr. Early "is bound by the terms of his [binding] plea agreement, and
7 [the Court] decline[s] to vitiate the terms of his bargained-for
8 exchange with the government." *Cortez-Arias*, 425 F.3d at 548. Mr. Early
9 may not now file a § 2255 motion because he expressly waived this right
10 in the plea agreement, except for a § 2255 motion based on ineffective
11 assistance of counsel.

12 Mr. Early cannot obtain § 2255 relief based on a claim of
13 ineffective assistance of counsel in light of *Johnson*. When assessing
14 whether counsel's assistance was reasonable considering all the
15 circumstances, the Court must consider the adequacy of counsel's
16 assistance at the time of the assistance and whether Mr. Early was
17 prejudiced by counsel's inadequate performance. *See Strickland v.*
18 *Washington*, 466 U.S. 668, 687-88 (1984). At the time of plea and
19 sentencing, Mr. Early's counsel reasonably understood that Mr. Early
20 would qualify as an Armed Career Criminal or a Career Offender under
21 the Sentencing Guidelines given Defendant's prior convictions for first
22 degree burglary under RCW 9A.52.020(1)(B), second degree assault under
23 RCW 9A.36.021(1)(a), and two convictions for distributing controlled
24 substances under RCW 69.50.401(A). *See* Plea Agreement, ECF No. 78 ¶
25 8(b); Presentence Investigation Report, ECF No. 103.

1 Even if Mr. Early had proceeded with the original Indictment,
2 plead to the Indictment, and had been found not to have been an Armed
3 Career Criminal or a Career Offender, Mr. Early was likely facing a
4 total offense level of 33, given the original charges and the amount of
5 methamphetamine involved, and a criminal history category VI, which
6 results in a range of 245-293 months. Mr. Early was sentenced well below
7 this Guideline range. Therefore, Mr. Early would be unable to show
8 prejudice resulting from his prior counsel's advice to proceed with an
9 Information Superseding Indictment and to plead to the drug distribution
10 charge therein.

11 Accordingly, Mr. Early is plainly not entitled to § 2255 relief
12 in light of *Johnson* because he negotiated a binding plea agreement, as
13 part of his binding Plea Agreement he waived his right to file a § 2255
14 motion except for ineffective assistance of counsel, and his prior
15 counsel was not ineffective for advising Mr. Early that he was
16 potentially facing an ACCA sentence under the then-existing ACCA case
17 law. The Court finds no basis on which counsel would assist Defendant
18 with a *Johnson*-based motion.

19 For the reasons given above and as set forth in the Court's prior
20 Order, ECF No. 117, **IT IS HEREBY ORDERED:**

- 21 1. The Clerk's Office is to convert the Motion to Reconsider
22 Denial of Appointment of Counsel, **ECF No. 118**, to a **public**
23 motion because there is nothing contained in the motion that
24 requires restricting public review of the motion.
- 25 2. The Motion to Reconsider Denial of Appointment of Counsel,,
26 **ECF No. 118**, is **DENIED**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel and the U.S. Probation Office.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge